

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
Center for Biological Diversity,)	
)	
Plaintiff,)	
)	
v.)	1:22-cv-486-BAH
)	
U.S. Environmental Protection Agency, <i>et al.</i> ,)	
)	
Defendants.)	
)	

STIPULATED SETTLEMENT AGREEMENT

Plaintiff, the Center for Biological Diversity (“CBD”) and Defendants, the U.S. Environmental Protection Agency (“EPA”), the National Marine Fisheries Service (“NMFS”), and U.S. Fish & Wildlife Service (“FWS”) (collectively, “the Agencies”), by and through their undersigned representatives, enter into the following Stipulated Settlement Agreement (“Agreement”) for the purpose of resolving *Center for Biological Diversity v. U.S. Environmental Protection Agency, et al.*, Case No. 1:22-cv-486-BAH (D.D.C.), and state as follows:

WHEREAS, on February 24, 2022, Plaintiff filed its complaint in the above-captioned matter alleging violations of Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536, in connection with EPA’s 1993, 1998, and 2007 approvals under the Clean Water Act of Washington State’s water quality criteria for cyanide;

WHEREAS, on August 30, 2022, EPA granted a petition to, in pertinent part, evaluate Washington State’s existing water quality criteria for cyanide to determine whether such criteria still meet the requirements of the Clean Water Act and, if not, for the EPA Administrator to make a determination pursuant to Section 303(c)(4)(B) of the Clean Water Act, 33 U.S.C. § 1313(c)(4)(B), that revised criteria for cyanide are necessary for Washington State’s water quality criteria to meet the requirements of the Act;

WHEREAS, Section 303(c)(4)(B) of the Clean Water Act, 33 U.S.C. § 1313(c)(4)(B), provides that if the EPA Administrator determines that new or revised criteria are necessary to meet the requirements of the Act, EPA shall promptly prepare and publish proposed federal regulations setting forth such new or revised criteria that meet the requirements of the Act;

WHEREAS, on May 25, 2023, EPA determined, pursuant to Section 303(c)(4)(B) and 40 C.F.R. § 131.22(b), that revised cyanide criteria for the state of Washington are necessary to meet the requirements of the Clean Water Act;

WHEREAS, pursuant to Clean Water Act Section 303(c)(4), EPA must propose and promulgate revised cyanide criteria to address the May 25, 2023 determination unless, prior to such promulgation, Washington State adopts and submits revised cyanide criteria that EPA approves in accordance with the Act;

WHEREAS, on February 15, 2024, Washington State proposed a rule to revise its freshwater cyanide criteria and intends to adopt the revised criteria in the summer of 2024 and, pursuant to 40 C.F.R. § 131.20(c), must submit such criteria to EPA for review under Section 303(c) of the Clean Water Act within 30 days of adoption;

WHEREAS, in its February 15, 2024 proposed rule, Washington State did not propose to adopt revisions to its marine cyanide criteria and Puget Sound cyanide criteria and therefore those criteria will remain unchanged and will not be submitted to EPA for review under Section 303(c) of the Clean Water Act;

WHEREAS, if Washington State adopts and submits revised freshwater cyanide criteria that EPA proposes to approve under Section 303(c) of the Clean Water Act, EPA will evaluate the effects of the revised freshwater cyanide criteria and, to the extent required under Section 7 of the ESA, request initiation of consultation with FWS and/or NMFS;

WHEREAS, if ESA Section 7 consultation on the revised freshwater cyanide criteria for Washington State is determined to be necessary, the Services and EPA will address the requirements of Section 7 of the ESA and implementing regulations at 50 C.F.R. Part 402 and complete consultation prior to EPA taking final action on Washington State's revised freshwater criteria;

WHEREAS, EPA intends to conduct its ESA analysis on the revised freshwater cyanide criteria in conjunction with its ESA analysis on the current marine cyanide criteria and Puget

Sound cyanide criteria. EPA intends to conduct that analysis utilizing the same steps and timeline outlined below in subparagraphs 1.A through 1.E;

WHEREAS, the Parties agree that settlement in the manner described below is in the public interest and is an appropriate and efficient way to resolve the claims in the above-captioned case;

NOW THEREFORE, the Parties desire to compromise and settle Plaintiff's case according to the terms set forth below, and thus agree to this Stipulated Settlement Agreement:

1. Defendants agree to undertake the following actions:

- A. EPA will evaluate the potential effects of the State's current marine and Puget Sound cyanide criteria and determine whether consultation is required and, if so, will submit such evaluation to FWS and/or NMFS and request initiation of formal consultation or a letter of concurrence. EPA agrees to engage the Services in pre-consultation coordination and complete its ESA Section 7(a)(2) evaluation on the current marine and Puget Sound cyanide criteria and submit to FWS and/or NMFS within 18 months of Washington State's submission of revised freshwater cyanide criteria.
- B. If, pursuant to 1.A, EPA makes a written request for concurrence with a "not likely to adversely affect" determination regarding the current marine and Puget Sound cyanide criteria pursuant to 50 C.F.R. § 402.13, FWS and/or NMFS will issue any concurrence or non-concurrence within one hundred and twenty (120) days or other time frame agreed to by the Parties pursuant to Section 5.B of the date of EPA's request.
- C. If, pursuant to 1.A, the Agencies determine that formal consultation is required on the current marine and Puget Sound cyanide criteria, the Services, within sixty (60) calendar days of receipt of EPA's evaluation and request for initiation of formal consultation, will provide written acknowledgment of EPA's written request and either: (a) provide EPA with the date formal consultation was initiated, or (b) if the informational requirements of 50 C.F.R. § 402.14(c) have not been met, advise EPA of any data deficiencies and request either the missing data or a written statement that the data are not available. Consistent with 50 C.F.R. § 402.14(f), EPA will resolve

any data deficiencies within sixty (60) calendar days of receipt of the Service's notice of data deficiencies.

- D. Each of the Services will issue their respective biological opinions within 12 months of the date of their respective determinations that sufficient information has been received per 50 C.F.R. § 402.14(c) to initiate formal consultation. If there are mixed determinations in subparagraph 1.A above, requiring both informal and formal consultation with the State's current marine and Puget Sound cyanide criteria, the Services' informal consultation determinations will be issued with their respective biological opinions.
- E. If Washington State does not submit revised freshwater cyanide criteria to EPA by September 30, 2024, EPA will proceed with its ESA analysis on all current Washington State cyanide criteria (freshwater, marine, and Puget Sound). The Agencies will follow the commitments and timeline outlined above in subparagraphs 1.A through 1.D (from September 30, 2024).
- F. The dates outlined in paragraphs 1.A through 1.D are subject to the following contingencies set out in sub-paragraphs 1 through 3 below, in which case the timeframe for completing the consultation shall be extended as set out therein:
 - 1. as set forth in Section 1, the specified timeframes for the Services' actions are only triggered once EPA has acted. As such, any delay in EPA completing its obligations in Section 1 does not affect the specified timeframes for the Services' related action or response. If, however, a delay in EPA completing its obligations in Section 1 causes an unexpected disruption in the Services' abilities to comply with the specified timeframes, Defendants may use the process in Section 1.F.3 to notify the Plaintiff, and meet and confer about a proposed modification to the Agreement;
 - 2. if there is a lapse in federal appropriations, requiring one or more of the Agencies to suspend work until government operations are restored, then the deadlines set forth in this Agreement will be extended by an equal number of calendar days; or
 - 3. if an unforeseen and unavoidable event occurs, such as a natural disaster or unavoidable legal barrier or restraint, including those arising from actions of

persons or entities that are not party to this Agreement, that disrupts the ability of the Defendants to comply with the deadlines in this Agreement, Defendants will notify Plaintiff. The Parties (Plaintiff and Defendants) will meet and confer (virtually, telephonically, or in person) within 14 calendar days after written notice (or such time thereafter as is mutually agreed upon) in a good faith effort to resolve any modification request or dispute related to the event and to agree upon a stipulated motion to the Court to modify the Agreement.

2. Plaintiff agrees that, upon approval of this Agreement by the Court, Plaintiff's Complaint shall be dismissed with prejudice except for any claims concerning Washington State's current freshwater cyanide criteria. Claims concerning the current freshwater criteria shall be dismissed without prejudice.
3. **Notice:** Defendants will provide Plaintiff with written notice (which may be by email) of EPA's submission of its evaluation to the Services (paragraph 1.A), and written notice and final copies of the of letters of concurrence or biological opinions within seven (7) days. For any matter relating to this agreement, the contact persons are:

For Plaintiffs:

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4. **Termination of this Agreement:** Defendants' commitments with respect to paragraphs 1.B through 1.E above shall be fulfilled in one of two instances: (1) paragraph 1.B through 1.E terminate if EPA determines that its proposed action will have "no effect" on listed species and/or critical habitat; or (2) the entire Agreement terminates after Defendants complete the commitments in paragraphs 1.B through 1.E.
5. **Future Modifications of this Agreement:**
 - A. The Order entering this Stipulated Settlement Agreement ("Order") may only be modified by the Court. The Order may be modified upon good cause shown by stipulated motion of all Parties filed with and approved by the Court, or upon written motion filed by one of the Parties and as granted by the Court after appropriate briefing.
 - B. The Parties agree that reasonable extensions of time may be necessary through the ESA Section 7(a)(2) consultation process. For example, if the scenario described in subparagraph 1.E does occur, EPA will proceed with its ESA analysis on all current Washington State cyanide criteria (freshwater, marine, and Puget Sound). If Washington State subsequently adopts freshwater cyanide criteria pursuant to CWA Section 303(c)(4)(B) before EPA takes final action on the current freshwater cyanide criteria, the Parties will work in good faith to modify any term of the Agreement. In the event that either Plaintiff or Defendants seek to modify the terms of this Agreement, they will provide written notice of the proposed modification and the reasons for such modification. The Parties will then meet and confer (virtually, telephonically, or in person) at the earliest possible time and seek this Court's approval for modification.
 - C. In the event that any party believes that another has failed to comply with any term or condition of this Agreement, it shall use the dispute resolution procedures specified in paragraph 6 below.
6. **Dispute Resolution:**
 - A. If any party believes another party has failed to comply with any term of this Agreement, the party asserting noncompliance shall provide the other(s) with written notice and the basis for the alleged noncompliance. The Parties shall meet and confer (virtually,

telephonically, or in person) to attempt to resolve the dispute within 14 calendar days of the written notice or such time thereafter as is mutually agreed upon.

- B. After the initial meet and confer, the Parties will have 30 days to resolve the dispute or such time thereafter as is mutually agreed upon. If the Parties are unable to resolve the dispute within that time, then Plaintiff may first file a motion to enforce the Order.
 - C. No party shall institute a proceeding for contempt of court unless a party is in violation of a separate order of the Court resolving a motion to enforce the terms of the Order.
7. **Attorneys' Fees and Costs:** Defendants and Plaintiffs will attempt to resolve any claims for fees and costs within 90 calendar days of entry of this Agreement. In the event the Parties are not able to resolve any claims for attorneys' fees and costs within that time, Plaintiff may move for fees and costs of litigation pursuant to 16 U.S.C. § 1540(g) or 28 U.S.C. § 2412. Plaintiff reserves any claims against EPA for recovery of costs of litigation (including reasonable attorney and expert witness fees) through and including final resolution of this lawsuit, including compliance with and completion of the terms of this Settlement Agreement. Defendants reserve all defenses related to attorneys' fees and costs.
8. **Representative Authority:** The undersigned representatives of Plaintiff and Defendants certify that they are fully authorized by the party or parties whom they represent to enter into the terms and conditions of this Agreement and to legally bind those parties to it.
9. **Compliance with Other Laws:** Nothing in this Agreement shall be interpreted as, or shall constitute, a commitment or requirement that Defendants obligate or pay funds, or take any other actions in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable law. Nothing in this Agreement is intended to, or shall be construed to, waive any obligation to exhaust administrative remedies; to constitute an independent waiver of the United States' sovereign immunity; to change the standard of judicial review of federal agency actions under the APA; or to otherwise extend or grant the Court jurisdiction to hear any matter, except as expressly provided in the Agreement.
10. **Mutual Drafting and Other Provisions:**
- A. It is hereby expressly understood and agreed that this Agreement was jointly drafted by Plaintiff and Defendants. Accordingly, the Parties hereby agree that any rule of construction to the effect that ambiguity is construed against the drafting party shall be

inapplicable in any dispute concerning the terms, meaning, or interpretation of the Agreement.

- B. This Agreement contains all of the agreements between Plaintiff and Defendants and is intended to be and is the final and sole agreement between Plaintiff and Defendants concerning the complete and final resolution of Plaintiff's complaint. Plaintiff and Defendants agree that any other prior or contemporaneous representations or understandings not explicitly contained in this Agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this Agreement must be in writing, and approved by this Court.
- C. This Agreement is the result of compromise and settlement, and does not constitute an admission, implied or otherwise, by Plaintiff or Defendants to any fact, claim, or defense on any issue in this litigation. No part of this Agreement shall have precedential value in any pending or future litigation, representations before any court, administrative action, forum, or any public setting. For example, no party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for making determinations regarding the progress or completion of an ESA consultation.
- D. Except as set forth in this Agreement, the Parties retain all rights, claims, defenses, and discretion they may otherwise have. Except as expressly provided in this Agreement, nothing herein shall be construed to limit or modify any discretion accorded Defendants by statute, regulation or by general principles of administrative law.

11. **Continued Jurisdiction:** Notwithstanding the dismissal of this action, the Parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement, including any disputes regarding fees and costs as described in paragraph 7 above, and to resolve any motions to modify the terms of this Agreement, subject to the dispute resolution procedures specified in paragraph 6 above. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

DATE: October 1, 2024

/s/ Ryan Adair Shannon

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